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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA- SAN FRANCISCO DIVISION

JAVIER HERRERA, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

CREDIT BUREAU OF NAPA COUNTY,
INC., a California corporation,

Defendant.

Case No.: 13-CV-0090-SI

**CORRECTED ANSWER AND
AFFIRMATIVE DEFENSES OF
DEFENDANT CREDIT BUREAU OF
NAPA COUNTY, INC. TO COMPLAINT
OF JAVIER HERRERA**

JURY TRIAL DEMANDED

**District Judge: Hon. Susan Illston
Complaint Filed: January 3, 2013**

Pursuant to the Court's request, Defendant CREDIT BUREAU OF NAPA COUNTY, INC., submits the following Corrected Answer and Affirmative Defenses. Please note that nothing within this Answer pleading, or the documents filed herewith have been changed, with the exception of the case number.

Defendant CREDIT BUREAU OF NAPA COUNTY, INC., (hereinafter referred to as "Defendant" and/or "CBNC"), as and for its answer to the Complaint of Plaintiff JAVIER

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1 HERRERA (hereinafter referred to as "Plaintiff"), denies each and every allegation contained
2 therein, unless otherwise admitted or qualified herein.

3 In response to the introductory paragraph of Plaintiff's Complaint, CBNC admits that
4 Plaintiff purports to bring a putative class action against CBNC seeking various forms of relief.
5 CBNC denies that it violated any law in this matter that would entitle Plaintiff to such relief, and
6 further denies that a class action is appropriate in this case.
7

8 **I.**

9 **RESPONSES TO PLAINTIFF'S ALLEGATIONS**

10 1. In response to paragraph 1 of Plaintiff's Complaint, CBNC admits that it is
11 sometimes a debt collector and sometimes works with, or on behalf of, companies such as
12 Verizon Wireless.
13

14 2. In response to paragraph 2 of Plaintiff's Complaint, Plaintiff sets forth
15 conclusions of law to which CBNC is not obligated to respond.
16

17 3. In response to paragraph 3 of Plaintiff's Complaint, CBNC denies that it violated
18 the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* ("TCPA"). As to the balance
19 of said paragraph, CBNC lacks knowledge or information sufficient to either admit or deny the
20 allegations and, therefore, denies the same.
21

22 4. In response to paragraph 4 of Plaintiff's Complaint, CBNC denies that it violated
23 the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* and denies that class
24 treatment of this claim is appropriate. As to the balance of said paragraph, CBNC lacks
25 knowledge or information sufficient to either admit or deny the allegations and, therefore, denies
26 the same.
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1 5. In response to paragraph 5 of Plaintiff's Complaint, CBNC lacks knowledge or
2 information sufficient to either admit or deny the allegations and, therefore, denies the same.

3 6. In response to paragraph 6 of Plaintiff's Complaint, Plaintiff sets forth
4 conclusions of law to which CBNC is not obligated to respond. As to the balance of paragraph
5 6, CBNC lacks knowledge or information sufficient to either admit or deny the allegations and,
6 therefore, denies the same.

7 7. In response to paragraph 7 of Plaintiff's Complaint, CBNC admits that Plaintiff
8 seeks the relief discussed in said paragraph, but denies that Plaintiff or any putative class is
9 entitled to such relief.

10 8. CBNC admits the allegations of paragraph 8.

11 9. CBNC admits the allegations of paragraph 9.

12 10. As to paragraph 10 of Plaintiff's Complaint, Plaintiff sets forth conclusions of law
13 to which CBNC is not obligated to respond. As to the balance of paragraph 6, CBNC lacks
14 knowledge or information sufficient to either admit or deny the allegations and, therefore, denies
15 the same.

16 11. CBNC admits the allegations of paragraph 11.

17 12. In response to paragraph 12 of Plaintiff's Complaint, CBNC denies that it
18 harassed Plaintiff or other consumers. CBNC denies that it lacked consent, whether actual or
19 implied, to place telephone calls to Plaintiff or others in reference to alleged Verizon Wireless
20 accounts. Defendant lacks knowledge or information sufficient to either admit or deny the
21 balance of the allegations, as relevant here, of paragraph 12 and, therefore, denies the same.

22 13. In response to paragraph 13 of Plaintiff's Complaint, CBNC lacks knowledge or
23 information sufficient to either admit or deny the allegations and, therefore, denies the same.

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1 14. In response to paragraph 14 of Plaintiff's Complaint, CBNC denies that Verizon
2 Wireless was not provided with Plaintiff's Verizon Wireless telephone numbers for each Verizon
3 Wireless telephone he purchased.

4 15. In response to paragraph 15 of Plaintiff's Complaint, in view of the ambiguity of
5 the allegation set forth therein, CBNC lacks knowledge or information sufficient to either admit
6 or deny the allegations and, therefore, denies the same.

7 16. In response to paragraph 16 of Plaintiff's Complaint, CBNC lacks knowledge or
8 information sufficient to either admit or deny the allegations as to any non-Verizon Wireless
9 telephone number and, therefore, denies the same. To the extent paragraph 15 is intended to
10 apply to only Verizon Wireless telephone numbers of Plaintiff, CBNC denies it made harassing
11 or unauthorized, whether authorization was explicit or implied, telephone calls to Plaintiff.

12 17. In response to paragraph 17 of Plaintiff's Complaint, CBNC admits it sometimes
13 does business as Chase Receivables and that it utilizes the telephone number (800) 622-0484.
14 CBNC lacks knowledge or information sufficient to either admit or deny the balance of the
15 allegations of paragraph 17 and, therefore, denies the same.

16 18. In response to paragraph 18 of Plaintiff's Complaint, CBNC lacks knowledge or
17 information sufficient to either admit or deny the allegations as to any non-Verizon Wireless
18 telephone number and, therefore, denies the same. To the extent paragraph 18 is intended to
19 apply to only Verizon Wireless telephone numbers of Plaintiff, CBNC denies that neither it nor
20 Verizon Wireless were provided with Plaintiff's Verizon Wireless telephone numbers.

21 19. In response to paragraph 19 of Plaintiff's Complaint, Plaintiff has provided
22 insufficient information for CBNC to admit or deny that Plaintiff did or did not receive telephone
23 calls from CBNC and CBNC, therefore, denies the same. The balance of paragraph 19 describes
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1 telephonic technology as applied to “Defendant’s calls”, presumably to Plaintiff. Because
2 CBNC lacks knowledge or information sufficient to admit or deny whether Plaintiff received any
3 such calls from Defendant, and therefore has denied the same, CBNC likewise has insufficient
4 information to admit or deny that such technology was used during telephone calls it cannot
5 admit on present information occurred. Accordingly, CBNC on that basis likewise denies the
6 balance of the allegations of paragraph 19.
7

8 20. In response to paragraph 20 of Plaintiff’s Complaint, Plaintiff sets forth
9 conclusions of law to which CBNC is not obligated to respond. To the extent CBNC is required
10 to respond to the allegations of paragraph 20, CBNC admits that Plaintiff has pleaded in his
11 Complaint that this is a putative class action, however CBNC denies that this matter is
12 appropriate for class treatment, whether under Fed. R. Civ. P. 23(b)(2), (b)(3), or otherwise.
13

14 21. In response to paragraph 21 of Plaintiff’s Complaint, Plaintiff sets forth
15 conclusions of law to which CBNC is not obligated to respond. To the extent CBNC is required
16 to respond to the allegations of paragraph 21, CBNC denies that this matter is appropriate for
17 class treatment.
18

19 22. In response to paragraph 22 of Plaintiff’s Complaint, Plaintiff sets forth
20 conclusions of law to which CBNC is not obligated to respond. To the extent CBNC is required
21 to respond to the allegations of paragraph 22, CBNC denies that this matter is appropriate for
22 class treatment.
23

24 23. In response to paragraph 23 of Plaintiff’s Complaint, Plaintiff sets forth
25 conclusions of law to which CBNC is not obligated to respond. To the extent CBNC is required
26 to respond to the allegations of paragraph 23, CBNC denies that this matter is appropriate for
27 class treatment.
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1 29. In response to paragraph 29 of Plaintiff's Complaint, Plaintiff in this paragraph
2 references calls alleged to have been made without consent as more fully set forth in paragraph
3 28 of the Complaint. Because the matter set forth in paragraph 28 is denied, CBNC likewise
4 denies the allegations of paragraph 29 which incorporate therein the allegations of paragraph 28.
5 CBNC denies this matter is appropriate for class treatment. CBNC otherwise admits that it
6 sometimes uses in its business the sort of equipment described in paragraph 29, except that the
7 generation of numbers is not random or necessarily sequential as the numbers phoned are only
8 those utilized by individuals with a business relationship of some sort with CBNC or one of its
9 clients.
10

11
12 30. In response to paragraph 30 of Plaintiff's Complaint, CBNC is without
13 information sufficient to admit or deny the allegations set forth therein and, therefore, denies the
14 same.
15

16 31. In response to paragraph 31 of Plaintiff's Complaint, CBNC denies that it violated
17 the TCPA because its conduct adhered to the requirements of the TCPA and other applicable
18 law.
19

20 32. In response to paragraph 32 of Plaintiff's Complaint, CBNC denies that it is liable
21 for any damages alleged in the Complaint because its conduct adhered to the requirements of the
22 TCPA and other applicable law.
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24 33. In response to paragraph 33 of Plaintiff's Complaint, CBNC denies that it is liable
25 for any damages alleged in the Complaint because its conduct adhered to the requirements of the
26 TCPA and other applicable law.
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1 **II.**

2 **JURY TRIAL DEMANDED**

3 CBNC demands jury trial on all issues, claims, and defenses so triable.

4 **III.**

5 **AFFIRMATIVE DEFENSES**

6 CBNC asserts the following affirmative and or additional defenses. By asserting
7
8 these defenses, CBNC does not assume the burden or production, persuasion, or proof of any
9 issue for which Plaintiff has the burden under the law. Unless otherwise indicated, each defense
10 is asserted against all of Plaintiff's claims.

11 **FIRST AFFIRMATIVE DEFENSE**

12 The Complaint and the lone claim for relief contained therein is barred because Plaintiff
13 and one or more of the purported class members provided prior express consent, through an
14 established business relationship or otherwise, that he or she be called on his or her cell phone
15 number or residential phone number.

16 **SECOND AFFIRMATIVE DEFENSE**

17 To the extent that the Complaint seeks putative-class damages, the aggregated statutory
18 damages, if any, may result in potential ruinous liability for CBNC and may constitute excessive
19 fines in violation of the United States Constitution, Eight Amendment.

20 **THIRD AFFIRMATIVE DEFENSE**

21 All or part of the relief sought is barred by the applicable statute of limitations.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 Plaintiff lacks standing and/or capacity to either bring or maintain this action, or to obtain
24 the relief sought because, *inter alia*, Plaintiff and any putative class members have not been
25

1 harmed or suffered “injury in fact” by the alleged conduct at issue regardless of whether Plaintiff
 2 seeks only statutory damages. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It
 3 would appear self-evident that the recipient of a cell phone or residential phone call would first
 4 be required to demonstrate cognizable injury, that is, that he or she was both (1) charged, and (2)
 5 paid, for the call. *See* 47 U.S.C. §227(b)(1)(A)(iii).
 6

7 **FIFTH AFFIRMATIVE DEFENSE**

8 The Complaint and its lone claim for relief contained therein are barred because Plaintiff
 9 and the purported class members had a duty to take reasonable steps to mitigate and/or avoid
 10 their alleged damages. CBNC, on information and belief, alleges that Plaintiff and the purported
 11 class members failed to take any steps or delayed unreasonably in doing so. Had Plaintiff and
 12 the purported class members timely and diligently taken reasonable steps to mitigate and/or
 13 avoid their alleged damages, such alleged damages, if any, would have been reduced or avoided
 14 altogether.
 15

16 **SIXTH AFFIRMATIVE DEFENSE**

17 The sole claim alleged in the Complaint is barred by the doctrine waiver.
 18

19 **SEVENTH AFFIRMATIVE DEFENSE**

20 The Complaint, and the sole claim for relief alleged therein, is barred by the doctrine of
 21 unclean hands; specifically, among other things, Plaintiff and/or putative class members
 22 intentionally withheld contact information or deceived CBNC in an attempt to induce calls to his
 23 or her cell phone(s) and residential phone(s) so as to attempt to provide a combination of debt
 24 relief and the instant-pled affirmative claims.
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EIGHTH AFFIRMATIVE DEFENSE

The claim alleged in the Complaint is uncertain, ambiguous, and/or unintelligible.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has unreasonably delayed in bringing this action to the prejudice of CBNC and is therefore barred from bringing this action by the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of estoppel. Plaintiff assisted, directed, ordered, approved and/or ratified the alleged conduct by, *inter alia*, specifically providing to Verizon Wireless, or CBNC, or both, his wireless phone number and CBNC relied on these actions to its detriment.

ELEVENTH AFFIRMATIVE DEFENSE

All or part of the relief sought by Plaintiff and the putative class members may be barred by illegality, fraud, prior material breach, and/or breach of the duty of good faith and fair dealings arising out of, but not limited to, Plaintiff and/or putative class members' fraudulent conduct and the providing of false information during negotiations and contracting for the underlying debt that is the subject of the Complaint in this action.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to name all necessary and indispensable parties to this action.

THIRTEENTH AFFIRMATIVE DEFENSE

CBNC has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone calls in violation of the regulations prescribed under TCPA. 47 U.S.C. § 227(C)(5).

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FOURTEENTH AFFIRMATIVE DEFENSE

The subject telephone system is not an “automatic telephone dialing system” under the TCPA because the telephone system does not utilize a “random or sequential number generator,” as that term is contemplated by the act, to store or produce telephone numbers.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred due to privilege, absolute or qualified, including, but not limited to, the common interest privilege.

SIXTEENTH AFFIRMATIVE DEFENSE

When one accepts a credit arrangement, such as the Plaintiff, here, the Plaintiff impliedly consents for the creditor, such as Verizon Wireless or its agents or assigns, such as CBNC, here, to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy. In the debtor-creditor situation, the right of a debtor to privacy is subject to the right of a creditor to take reasonable steps to collect the debt.

SEVENTEENTH AFFIRMATIVE DEFENSE

No act or omission of CBNC was a substantial factor in bringing about the damages alleged, nor was any act or omission of CBNC a contributing cause thereof. Any alleged acts or omissions of CBNC were superseded by the acts or omissions of others, including Plaintiff or other third parties named or not named as in the Complaint, which were the independent, intervening and proximate cause of the damage or loss allegedly sustained by Plaintiff.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff’s Complaint fails to state a claim upon which relief may be granted.

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1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 On information and belief, Plaintiff may be contractually obligated to arbitrate, on an
 3 individual basis only, any dispute, claim, or controversy which arises out of the transaction that
 4 is the subject matter of the instant litigation. In the event this is correct, a timely motion to
 5 compel arbitration as an individual claim will be brought for hearing before the Court.
 6

7 **TWENTIETH AFFIRMATIVE DEFENSE**

8 This lawsuit may not be maintained as a class action because, among other things,
 9 Plaintiff and the putative class members are not similarly situated and the potential claims of the
 10 purported class members reflect variability.
 11

12 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

13 CBNC may have additional defenses that cannot be articulated due to Plaintiff's failure to
 14 particularize Plaintiff's claims, due to the fact that CBNC does not have copies of certain
 15 documents bearing on Plaintiff's claims and due to Plaintiff's failure to provide more specific
 16 information concerning the nature of the claims for damages and certain costs that Plaintiff
 17 alleges CBNC may be fully or partially responsible for. CBNC, therefore reserves the right to
 18 assert additional defenses upon further particularization of Plaintiff's claims, upon examination
 19 of the documents provided, upon discovery of further information concerning the alleged claims
 20 for damages and costs, and upon the development of other pertinent information.
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23 **IX.**

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Defendant CBNC prays for judgment against Plaintiff as follows:

- 26 1. That Plaintiff take nothing by way of his Complaint;
 27 2. That Plaintiff's Complaint be dismissed with prejudice;
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3. For costs and disbursements incurred herein, including attorneys' fees; and
4. For such other and further relief as the court may deem just and proper.

Dated: April 18, 2013 LAW OFFICES OF CHRISTOPHER C. SALDAÑA

By: /s/ Christopher C. Saldaña
Christopher C. Saldaña
Attorneys for Defendant CREDIT BUREAU OF NAPA
COUNTY, INC.

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